



Republic v Chief Executive Officer, Independent Electoral and Boundaries Commission & another; Waithera (Exparte Applicant) (Judicial Review E006 of 2023) [2023] KEELRC 2110 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2110 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW E006 OF 2023
JK GAKERI, J
SEPTEMBER 20, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**THE CHIEF EXECUTIVE OFFICER, INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST RESPONDENT
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND RESPONDENT**

AND

THOMAS WAWERU WAITHERA EXPARTE APPLICANT

RULING

1. Before the court for determination is the Respondent’s Notice of Preliminary Objection dated 17th March, 2023 urging that;

1. The application by the applicant is incompetent, fatally flawed, incurably defective and an abuse of the court process having been lodged in violation of Section 9(2) of the Administrative Action Act, 2015 as the applicant has not exhausted all the 2nd Respondent’s internal dispute resolution mechanisms for appeal and/or review despite having admitted to the existence of an internal appeals process and the court ought to direct that the applicant shall exhaust such remedy before instituting proceedings in accordance with Section 9(3) of the *Fair Administrative Action Act*.



2. The application is incompetent, fatally flawed, incurably defective and an abuse of court process for having been lodged without formally moving this court for exemption under Section 9(4) of the *Fair Administrative Action Act*, 2015. Neither application nor prayer for exemption has been made and the court ought to down its tools and direct the applicant to the appropriate forum.
 3. The application constitutes an attempt to unlawfully invoke the jurisdiction of this court and bypass the mandatory requirements of Section 9(2) and 9(4) of The *Fair Administrative Action Act*, 2015 with respect to the requirement for exhaustion of internal dispute resolution mechanisms available to the applicant before approaching the court (Krystalline Salt Ltd V Kenya Revenue Authority (2019) eKLR).
 4. The leave sought vide the Chamber Summons Application dated 1st February, 2023 and granted by the court on 7th February, 2023 was irregular for having been granted without exemption from the requirement to exhaust internal dispute resolution mechanisms in accordance with Section 9(4) of the *Fair Administrative Action Act*, 2015.
 5. The Application be dismissed with costs to the Respondent.
2. Attached to the Preliminary Objection is a Notice of Motion of even date seeking a stay of the orders granted by the court on 7th February, 2023 granting the ex parte applicant leave to apply for Judicial Review by way of an order of certiorari to quash the decision of the Respondents contained in the letter dated 19th January, 2023 dismissing the applicant.
 3. That the court be pleased to review, vary, discharge or set aside its order issued on 7th February, 2023.
 4. The Notice of Motion is based on the grounds set forth on its face and the Supporting Affidavit sworn by Edwin Moni Mukele, counsel for the Respondents who deposes that since the Application was grounded on the *Fair Administrative Action Act*, 2015 and the Applicant had not prayed for exemption under Section 9(4) of the Act, and had not previously done so, the Chamber Summons was filed in violation of Section 9(2) of the Act as he had not exhausted the Respondents internal dispute resolution mechanisms for appeal and review and should have been directed to do so.
 5. That the courts jurisdiction is unlawfully invoked and the leave granted was a mistake and/or error apparent on the face of the record and failure to review the order amounts to conduction of illegality.

Response

6. In his Replying Affidavit, the Respondent depones that the Disciplinary Committee consisted of two Commissioners which denied him the right to appeal.
7. The gist of the Respondent's arguments is that the 2nd Respondent did not adhere to its Human Resource instruments.
8. That under the instruments, it was unclear which came before the other review and appeal.
9. That because the affiant appeared before the Commission Disciplinary Committee, he should be exempted from the doctrine of exhaustion as the appeal would not have been fair and genuine, alternative procedure and no witness testified.



10. The affiant further deposes that the Commission Disciplinary Committee consists of Commissioners and the Commission had no Commissioners.
11. That the dismissal letter makes no reference to the disciplinary proceedings but refers to the 284 plenary meeting held on 6th January, 2023 which deliberated on the case and found the affiant culpable yet the Commissioners were away on 6th January, 2023 conducting a Senatorial By-election in Elgeyo Marakwet.
12. The affiant deposes that he did not appeal as there is no panel to hear the appeal and the panel that heard him would have heard the appeal.

Applicant's submissions

13. Counsel isolated four issues including costs. Others included, whether the application is bad in law under the doctrine of exhaustion, review, vary or discharge and/or set aside the order issued on 7th February, 2023 and grant of stay.
14. On the 1st issue, counsel relied on Section 9 of the *Fair Administrative Action Act* to urge that the Act required exhaustion of internal remedies before seeking judicial redress and the dismissal of the applicant was an administrative action and he was bound to exhaust the internal dispute resolution mechanisms.
15. Reliance was made on the sentiments of the Court of Appeal in Geoffrey Muthinja & another V Samuel Muguna Henry & 1756 others (2015) eKLR on the doctrine of exhaustion as were those of Mativo J. in Krystalline Salt Ltd V Kenya Revenue Authority (Supra) to submit that the applicant had not sought for exemption before filing the Chamber Summons and had not established the exceptional circumstances to warrant exemption.
16. The sentiments of the court in William Odhiambo Ramogi & 3 others V Attorney General & 4 others (2020) eKLR were cited to demonstrate the exemptions under Section 9 of the *Fair Administrative Action Act*, 2015 to urge that the applicant had not demonstrated any of them as the Commissioners were yet to take up office, who are supposed to appoint members of the Appeals Committee and the 2nd Respondent's inability to constitute the committee had not been demonstrated and the applicant sought no information from the 2nd Respondent on how the appeal or review process would be deployed.
17. The court was urged to find that the Chamber Summons was pre-mature and offended the doctrine of exhaustion.
18. On review, variation and/or setting aside of the order of 7th February, 2023, counsel submitted that the court had jurisdiction to do so under Section 80 of the *Civil Procedure Act* and Order 45 Rule 10 of the Civil Procedure Rules, 2010 as the Chamber Summons Application was filed in violation of Section 9(2) of the *Fair Administrative Action Act*, 2015 as the applicant had not exhausted internal mechanisms.
19. Reliance was made on the sentiments of the Supreme Court in United Millers Ltd V Kenya Bureau Standards & 5 others (2021) eKLR on the necessity to exhaust internal mechanisms and judicial restraint.
20. That the leave was granted in error.
21. The decision in Anthony Gachara Ayub v Francis Mahinda Thinwa [2014] eKLR and others were relied upon to urge the court to review, vary and/or set aside the order issued on 7th February, 2023.



22. On stay of the order issued on 7th February, 2023, counsel urged that since the court had jurisdiction to do so and the order was irregular, the same ought to be stayed as the Respondent stood to loose legal costs in defending a suit instituted illegally.

Respondent's submissions

23. Counsel isolated no particular issues but submitted on various points.
24. It was submitted that the law provided exceptions to the doctrine of exhaustion and it was the duty of the court to consider the suitability of the appeal mechanism in the context of the particular case.
25. Second, counsel urged that courts had jurisdiction to consider valid grievances from parties who lacked adequate audience before the forum created by statute or those who have no audience.
26. The decision of Mativo J. in *Night Rose Cosmetics [1972] Ltd v Nairobi County Government & 2 others [2018] eKLR* was relied upon.
27. That the Respondent/Applicant had demonstrated violation of his fundamental rights and fair labour practices and was expected to appeal to the same body.
28. Reliance was made on the provisions of the 2nd Respondent's Human Resource and Administration Policies and Procedures Manual herein after Human Resource Instruments on *the Constitution* of the Respondent's Human Resource Management Advisory Committee and the Commissions Disciplinary Committee and the Respondent appeared before the Commission Disciplinary Committee on 3rd January, 2023.
29. Counsel made reference to the appellate process and review before the Commission.
30. Counsel urged that if a dismissal was made by the plenary, it was inconceivable that the same employee would appeal to the same body.
31. Counsel urged that there was ambiguity on appeal and review as per the 2nd Respondent's Human Resource Instruments.
32. Counsel further urged that the Respondent should be exempted from the doctrine of exhaustion.
33. Reference was made to the sentiments of Court of Appeal in *Fluer Investments Ltd v Commissioner of Domestic Taxes* and another [2018] eKLR as well as Speaker of National Assembly v *Njenga Karume [1990 – 1994] EA 546* on when a Court of law could intervene before the doctrine of exhaustion is fulfilled.
34. The decision in *Republic v Independent Electoral and Boundaries Commission and others Ex parte, the National Super Alliance Kenya (NASA) [2017] eKLR* was also cited to reinforce the submission on exemptions to the doctrine such as the exhaustion requirement would not serve the values enshrined in *the Constitution* or law.
35. Counsel urged that since the Human Resource Instrument of the 2nd Respondent were ambiguous on appeal as it was to same decision maker, it was not an alternative procedure and remedy and the Chamber Summons was thus not premature.
36. That since the appellate committee consists of Commissioners and the 2nd Respondent had none to date and the proceedings were illegal as no witness was called to adduce evidence and it took almost 20 months and the appeal would have been to the same panel.



37. According to counsel, the provisions of paragraph 12.11.4(iv) of the 2nd Respondent's Human Resource Instruments were not complied with.
38. Counsel further relied on the provisions of Section 7(2)(f) of the *Fair Administrative Action Act* on review of an administrative decision.
39. Counsel urged that the process adopted by the Respondent was marred by irregularities rendering an appeal difficult as the Respondent was denied access to the evidence before the hearing.
40. That the process had a pre-determined decision and was illegal ab initio.
41. Counsel urged the court to find the foregoing as an exceptional circumstances and exhaustion would not serve the values enshrined in *the Constitution* or law.

Findings and determination

42. The issues for determination are;
 - i. Whether the Respondent's Notice of Preliminary Objection meets the threshold of a Preliminary Objection.
 - ii. Whether the applicant's suit is bad in law under the doctrine of exhaustion.
 - iii. Whether the orders granted on 7th February, 2023 should be varied, reviewed and/or set aside or stayed.
43. As to whether the Notice of Preliminary Objection dated 17th March, 2023 meets the threshold of a Preliminary Objection as enunciated in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, the court is of the view that since the notice is founded on the jurisdiction of the court, the notice meets the test of a Preliminary Objection as Law JA stated;

“... a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection of the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.”
44. Since jurisdiction is a matter of law, the notice of Preliminary Objection fits the bill.
45. As to whether the Preliminary Objection is merited, this ushers the court to the issue as to whether the Chamber Summons dated 1st February, 2023 was filed in violation of the doctrine of exhaustion encapsulated in the provisions of the *Fair Administrative Action Act*, 2015.
46. Section 9(2) of the Act provides that;
 - (2) The High Court or a Subordinate Court under Sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
 - (3) The High Court or a Subordinate Court shall, if it is not satisfied that the remedies referred to in sub-section 2 have been exhausted, direct the applicant shall first exhaust such remedy before instituting proceedings under Sub-section (1).



- (4) Notwithstanding sub-section (3), the High Court or a Subordinate Court may, in exceptional circumstances and on application by the applicant exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
47. It is common ground that the Respondent/Applicant's employment was terminated by the 2nd Respondent on 19th January, 2023 allegedly for gross-misconduct and was accorded 6 weeks to appeal but did not.
48. The Chamber summons by the Respondent was filed on 2nd February, 2023 long before the 6 weeks period had lapsed.
49. It is unclear to the court why the Respondent did not appeal for purposes of the record and demonstrate his wish to remain in employment notwithstanding any misgivings he had on the process employed by the Respondent.
50. The court is in agreement with the applicant counsel's submission that the Respondent tendered no evidence to demonstrate that the 2nd Respondent was incapable of forming the necessary committee stipulated in Section 12.14 of the Human Resource Instruments.
51. Had the Respondent filed an appeal, it would have been incumbent on the applicants to respond or explain the challenges it was facing, if any. Armed with the applicant's response, or lack of it, the Respondents case would have been different.
52. As correctly submitted by the Applicant's counsel, Section 9(2) of the *Fair Administrative Action Act, 2015* is couched in mandatory terms that the internal mechanisms for appeal and review must be exhausted as held by Mativo J. in *Krystalline Salt Ltd v Kenya Revenue Authority* [2019] eKLR that;
- “A proper construction of Section 9(2) and (3) above leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by Section 9(4) . . .”
53. In addition, the learned judge held that “the applicant must first apply to the court and demonstrate the existence of exceptional circumstances.”
54. The Respondent herein did not make any application or plead that his case fell within the exceptions envisioned by Section 9(4) of the *Fair Administrative Action Act, 2015*.
55. Neither the Supporting Affidavit sworn by the Respondent on 1st February, 2023 nor the statement on record of even date make reference to the exceptional circumstances under Section 9(4) of the *Fair Administrative Action Act, 2015*.
56. Evidently, the Respondent did not comply with the provisions of Section 9(4) of the Act as regards the burden of proof and the attendant application.
57. Significantly, Section 9(4) of the *Fair Administrative Action Act, 2015* is couched in permissive terms as implied by the use of the term “may” which signifies judicial discretion.
58. While the applicant submitted that the Respondent had not established the exceptional circumstances to warrant exemption from the requirements of Section 9(2) of the *Fair Administrative Action Act,*



2015, owing to the absence of a formal application, the Respondent relied on the untested evidence he intends to rely to argue that;

- i. The Respondent has a valid grievance and has no quality of audience proportionate to the interests he wishes to advance.
- ii. He had demonstrated that his fundamental rights were violated.
- iii. The 2nd Respondent's Human Resource and Administration Policies and Procedures Manual were not complied with.
- iv. There is ambiguity on the provisions of 2nd Respondent's Manual on appeals.
- v. The disciplinary committee was illegally constituted and the hearing was illegal.
- vi. The 2nd Respondent has no Commissioners.

59. Although it is common ground that the 2nd Respondent has had no Commissioners since January 2023, the Respondent adduced no evidence that the 2nd Respondent was facing any other challenges by 1st February, 2023 or it had indicated its inability to conclude the appeal within a reasonable time for the simple reason that the Respondent refused to file an appeal.

60. The Respondent relies on the sentiments of the court in Republic v Independent Electoral Boundaries Commission and others Ex Parte The National Super Alliance Kenya (NASA) (Supra) as follows;

“What emerges from our jurisprudence in these cases are at least two principles; while exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved including level of public interest involved and polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.

As the Court of Appeal acknowledged in the Shikara Ltd case (Supra), the High Court may in exceptional circumstances find that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on constitutional interpretation especially in virgin areas or where an important constitutional value is at stake.”

61. Although the Respondent contends that the Disciplinary Committee was illegally constituted, he has not provided evidence as to the illegality or copies of minutes of the meeting or list of attendees.

62. Similarly, other than the right to be heard under Article 47 of *the Constitution* of Kenya, 2010 and the right to fair labour practices (Article 41), the Respondent has not cited any other Constitutional provision to justify a Judicial Review Application.

63. Having failed to appeal the decision of the Disciplinary Committee, the Respondent cannot at this stage be heard to say that the appellate process was flawed or ambiguous. Put differently, the Respondent did not test the waters to ascertain its depth.

64. The Respondent's submission and averment that it was unclear as to whether one had to appeal then go for a review or review and appeal cannot avail the Respondent as the dismissal letter dated 19th January, 2022 was explicit that he had the right to appeal the decision of the Commission within 6 weeks but did not nor did he apply for a review of the decision.



65. Similarly, the averment that he did not appeal because there was no panel to hear the appeal is unsustainable as he was unaware of the duration it would take to appoint new Commissioners and could not testify as to how the appeal would be dealt with and by whom.
66. The case for exceptional circumstances would have been much stronger if he had appealed the decision and had no response or had a response with no time frame on when the appeal would be heard and determined.
67. The court cannot at this juncture fault the process as the Respondents evidence has not been tested.
68. This would have been a good case for the court to hold that the provisions of Section 9(4) of the *Fair Administrative Action Act*, 2015 applied on the ground that the Respondent had no Commissioners and thus no one to hear and determine the appeal.
69. In this case, the Respondent has no pending appeal and thus did not comply with the requirements of Section 9(2) of the Act. However, in light of the prevailing circumstances, it would be unproductive to require the Respondent to file an appeal as the prescribed duration has already lapsed and he knowingly refused to do so.
70. The foregoing reasoning finds support in the Court of Appeal decision in Geoffrey Muthinja & another v Samuel Muguna Henry and 1756 others where the court expressed itself as follows;

“It is imperative that where a dispute resolution mechanism exists outside courts the same be exhausted before the jurisdiction of the court is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands courts to encourage alternative means of dispute resolution.

We find and hold that the exhaustion doctrine applies even where as argued by the appellants herein what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. . .

By failing to do so, and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits premature.”

71. These sentiments apply on all fours to the circumstances of the instant case.
72. Having so found, I will now proceed to determine whether the applicant has established a case for a review, variation and/or setting aside of the order granted on 7th February, 2023 or stay the same.
73. Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provide for review of decrees or orders made by the court.
74. Rule 33 provides;
 1. A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgement or ruling –
 - a. . . .



- b. on account of some mistake or error apparent on the face of the record;
- c. ...
- d. for any other sufficient reason.

75. According to the applicant, the order granted on 7th February, 2023 was made pursuant to mistake and/or error of law that is apparent on the face of the record, in that the Respondent had not exhausted all internal dispute resolution mechanisms as the court has found.

76. That the court will be condoning an illegality if it does not review, vary and/or set aside the orders.

77. The phrase error apparent on the face of the record has been explained variously in countless decisions such as *Edison Kanyabwera v Pastori Tumwebaze* [2005] UGSC 1 Court of Appeal in *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR.

In the latter case, the court stated:-

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established.”

78. The most authoritative explanation of the phrase “error apparent on the face of the record” was given by the Court of Appeal in *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1 EA 243, as follows;

“... Where an error on a substantial point of law stares one in the face, and there could reasonably be no two options, a clear case of error apparent on the face of the record would be made out ...”

79. Having found that the Respondent did not complete the appellate or review process by way of filing an appeal within 6 weeks as directed, the court is in agreement with the applicant’s submission that the order made on 7th February, 2023 ought to be reviewed in light of an error apparent on the face of the record and the most efficacious review mechanism is setting aside of the order in its entirety.

80. The foregoing finding and holding disposes of the issue of stay of the order dated 7th February, 2023.

81. Needless to emphasize, the gravamen of the Respondent’s case is dismissal from employment which he alleges was marred by illegalities and irregularities including non-compliance with the 2nd Respondent’s Human Resource and Administration Policies and Procedures Manual among other allegations.

82. These are contested factual issues which require canvassing by evidence.

83. In *Republic v Commissioner of Domestic Taxes Ex Parte Fluer Investments Ltd* [2020] eKLR, Mativo J. (as he then was) stated as follows;

“Judicial review looks into the legality of the dispute not contested matters of evidence. Further, determining the above issues will involve a merit review, a function that is outside the purview of Judicial review jurisdiction. It is a dangerous invitation to this court to determine a strictly civil dispute without hearing evidence. I am fortified by *Seventh Day Adventist Church (East Africa) Ltd v Permanent Secretary, Ministry of Nairobi Metropolitan Development and another* [2014] eKLR which held that –



“ . . . where the determination of the dispute before the court requires the court to make a determination on disputed issues of fact, that is not a suitable case for judicial review since judicial review jurisdiction is a special jurisdiction which is neither a civil nor criminal. . .

In Republic v Registrar of Societies and 3 others Ex Parte Lydia Cherubet and 2 others [2016] eKLR the court decreed the practice of bringing claims through judicial review which require the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of fact . . .”

84. Similarly, in Republic v Attorney General & 4 others Ex parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR, it was held inter alia;

“ . . . It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the court to determine the merits of two or more different versions presented by the parties, the court would not have jurisdiction in a judicial review proceedings to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore, judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The court in judicial review proceedings is mainly concerned with the question of fairness to the applicant.”

85. In essence, the Respondent is seeking for orders which guarantee reinstatement to employment or dismissal from employment on disputed facts and the evidence has not been tested.

86. The court is not persuaded that the applicant’s invitation is judicious and prefers that the parties proceed under another avenue, through a claim as the dismissal and the alleged violation of rights are remediable through a claim.

87. In the end, the court is satisfied that the applicant’s Notice of Motion and Preliminary Objection dated 17th March, 2023 are merited and the following orders commend themselves;

- a. An order be and is hereby issued setting aside the order granted by this court on 7th February, 2023.
- b. The Chamber Summons Application dated 1st February, 2023 was filed in violation of the provisions of Section 9(4) of the *Fair Administrative Action Act*, 2015.
- c. The Chamber Summons dated 1st February, 2023 is unsustainable and is accordingly struck out with directions that the suit be instituted as a claim.
- d. There shall be no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF SEPTEMBER 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and



subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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